81-2380

No.

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In the Supreme Court of the United States

October Term, 1981

THOMAS J. PENNAVARIA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, Thomas J. Pennavaria, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 30, 1982.

QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause, in a criminal case, prohibits charging a jury that "reckless conduct" is sufficient to support a finding of guilt beyond a reasonable doubt.

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thomas J. Pennavaria
United States of America, Office of the United States Attorney, for the Western District of Pennsylvania

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OPINION BELOW

No opinion was rendered by either the Court of Appeals or the United States District Court for the Western District of Pennsylvania.

The Court of Appeals issued a Judgment Order which appears in the Appendix hereto.

JURISDICTION

The Court of Appeals filed its Judgment Order on March 30, 1982 and denied petitioner's application for rehearing by Order dated April 23, 1982. The Court of Appeals stayed the issuance of the formal mandate until June 29, 1982.

This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On February 26, 1980, a grand jury sitting in the Western District of Pennsylvania returned a ninety-eight count indictment against Petitioner. Seventy-one (71) counts of that indictment charged that the Petitioner willfully, knowingly and with

the intent to injure and defraud the bank, made and caused to be made, false entries on certain credit applications and other bank documents, in violation of 18 U.S.C. 1005. Seventeen (17) counts of the indictment charged that the Petitioner, with intent to injure and defraud, did willfully and knowingly misapply money and funds of the bank, in violation of 18 U.S.C. 636. Finally, ten (10) counts of the indictment alleged that the Petitioner received a fee, commission, or gift for procuring certain loans in violation of 18 U.S.C. 215.

The trial of this matter commenced on February 17, 1981 and on March 19, 1981, the jury returned a verdict of guilty as to sixty-eight (68) of the counts charging violations of 18 U.S.C. 1005; guilty as to fifteen (15) of the counts charging violations of 18 U.S.C. 656; and was undecided on the remaining counts. As to the undecided counts, the District Court granted a government motion for a mistrial.

On May 7, 1981, the Court sentenced the Petitioner to the custody of the Attorney General for imprisonment for a period of five (5) years.

The trial of this matter disclosed that the Petitioner, THOMAS J. PENNAVARIA, was the Assistant Manager of the Citizens National Bank, in Monroeville, Pennsylvania. As the Assistant Manager, his duties included processing and acting upon certain loan applications. The government sought to prove that the Petitioner, along with certain government witnesses, falsified credit applications, notes and disclosure statements, and misapplied the proceeds of these loans. They also sought to prove that, in some instances, the Petitioner received money in return for procuring these loans.

The testimony adduced during the government's case established that the loans which were the subject matter of the indictment were principally the result of the efforts of four (4) different individuals. Their collective testimony can best be summarized as indicating that they either obtained loans them-

selves or brought persons to the bank to obtain loans. In some instances, the loans were made presumably to repay a gambling debt and others the avowed purpose was not clearly expressed. In some instances, there was more than adequate collateral to support the loan. In others, this was not the case.

The testimony further indicated that many of the loan applications and notes or disclosure statements contained inaccurate or false information. In some instances, they were not signed by the person for whom the loan was presumably made. Their testimony attributed awareness of these facts to the Petitioner.

On the other hand, the Petitioner, while acknowledging that he processed the loan papers, testified that he neither participated in falsifying any applications or forging any applications, nor had any direct knowledge of such forgeries. He further indicated that in most, if not all instances, credit checks were made and/or collateral was required. In short, he denied any conscious involvement in a scheme to falsify the applications or defraud the bank.

In its charge to the jury, the District Court expressly instructed that if the jury found that the Petitioner had acted recklessly, they would be justified in returning a verdict of guilty. This instruction was to be applied to both the misapplication and false entry allegations. In addition, the instruction was given notwithstanding the language of the indictment which explicitly charged that the misapplication must have been done with "the intent to injure and defraud" and the statutory language of the false statement section which requires that any false statement, to be actionable, must be made with the intent to injure or defraud.

ARGUMENT

The decision below denied Petitioner due process because it allowed the jury to convict if they found his conduct to be

reckless, when the indictment charged that the conduct was done with the intent to injure and defraud and the statute required the intent to injure and defraud.

As a general rule, our Courts have long held that an essential element of any crime is the specific intent to violate the law. There are, however, certain limited circumstances where the Courts have sanctioned adherence to a lesser standard. One of these would appear to be prosecutions brought under 18 U.S.C. 656 (misapplication by bank officers), *United States v. Shoenhut*, 576 F.2d 1010 (3d Cir. 1978), *United States v. Krepps*, 605 F.2d 101 (3d Cir. 1979). While it may be true that these cases have sanctioned the recklessness standard, they have not given it an across the board application.

In the instant case, we respectfully suggest that giving such an instruction was error because of the specific language in the indictment. More particularly, an examination of the statute discloses that it does not refer to an "intent to injure and defraud", the bank. Here, even though the intent to injure and defraud is not set forth in the statute, the government voluntarily elected to include it in the indictment. Having done so, we submit that the government must then prove the intent to injure and defraud and that they can not do so based on a demonstration that Petitioner acted recklessly. In short, Petitioner's position is that the government, having chosen to include an allegation that he willfully and knowingly "and with the intent to injure and defraud", misapplied monies of the bank, must prove those precise charges.

Alternatively, Petitioner respectfully suggests that to sanction the giving of a charge on recklessness, in light of the language in the indictment, is to permit the government to bring one charge and prove another. That is, since the recklessness charge has been approved, an allegation concerning recklessness could have been included in the indictment. In the absence of such an allegation, the Petitioner is without notice

to defend and allowing the jury to return a verdict based on an uncharged allegation, with respect to an essential element of the offense, constitutes a fatal variance, *Stirone v. United States*, 361 U.S. 212 (1960), *United States v. Somers*, 496 F.2d 723 (3d Cir. 1974). We would again point out to the Court that this variance is the result of the government's election to charge this as a specific intent crime.

Of the eighty-eight (88) counts upon which the jury convicted Petitioner, seventy-one (71) involved allegations of false entries in violation of 18 U.S.C. 1005. Unlike 18 U.S.C. 656, this section specifically requires that any false entry, to be actionable, must be made with the intent to injure or defraud the bank. Also, unlike the interpretation given to the misapplication section, a recklessness charge has not been sanctioned or approved.

Notwithstanding the absence of any appellate authority, the District Court specifically instructed the jury in this case, that they could find the Petitioner guilty of a false entry violation if they found that his conduct was reckless or that he acted with reckless disregard of the interests of the bank. Even assuming that there is an inter-relationship between the two charges, in light of the disparity in the statutory language, such a charge is clearly erroneous.

The question of such a jury instruction has been dealt with at some length in *United States v. Welliver* (601 F.2d 203 5th Cir. 1979). *Welliver, supra*, also involved overlapping charges alleging misapplication and false entries. In sanctioning the reckless disregard charge for the misapplication allegations, the Court expressly held that recklessness was not the standard to be applied to a false entry case and reversed. In doing so, the Court held:

> "As pertains to Section 1005, however, this Court has never held 'recklessness' to be sufficient to satisfy the specific intent requirement, nor do we think it should....

However, it does not necessarily follow that in all cases proof of a specific intent to injure or defraud should be eliminated by a vague generalization equating recklessness with intent to defraud." *Welliver, Supra* at p. 210.

In the context of this case, where much of the defense involved testimony that Petitioner may have allowed documents to be taken out of the bank to be completed by the borrowers, and where a good deal of the government's case in chief corroborated this testimony, allowing a charge such as this is especially prejudicial. In essence, what the recklessness charge did was allow the jury to make a finding of guilt in the absence of any proof of intent but based merely upon bad banking practice. We therefore suggest that not only was the charge erroneous, but the overall prejudice caused by it is sufficient to require a new trial on all counts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

CHARLES F. SCARLATA
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Counsel for Petitioner

June, 1982

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 1982, three (3) true and correct copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was served, by first-class mail, upon the following:

Paul Brysh, AUSA
Office of the United States Attorney
Post Office & Courthouse
Grant & 7th Avenue
Pittsburgh, Pennsylvania 15219

CHARLES F. SCARLATA
Counsel for Petitioner

APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1915

UNITED STATES OF AMERICA

v.

THOMAS J. PENNAVARIA,
Appellant

(D.C. Crim. No. 80-00057)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
March 29, 1982
Before: GIBBONS, SLOVITER and BECKER,
Circuit Judges

J. ALAN JOHNSON
United States Attorney
SANDRA D. JORDAN
Assistant U.S. Attorney
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Attorney for Appellant

JUDGMENT ORDER

Thomas Pennavaria appeals from a judgment of sentence following his conviction for violating 18 U.S.C. §§215, 636 ad 1005. He contends:

(1) that the court erred in denying his motion for a severence;

(2) that the court's charge on recklessness was improper;

(3) that it was improper to permit rehabilitation of a government witness by use of a prior consistent statement;

(4) that the prosecutor's closing argument respecting witness D'Imperio was so unfair as to warrant a mistrial;

(5) that evidence of the amount of loss suffered by the bank which employed Pennavaria was improperly admitted.

These contentions are without merit.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

BY THE COURT,

/s/ JOHN J. GIBBONS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Sally Mrvos, *Clerk*

DATED: MARCH 30, 1982

Certified as a true copy and issued in lieu of a formal mandate on June 2, 1982.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

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AUG 11 1982
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No. 81-2380

In the Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS J. PENNAVARIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was deprived of a fair trial by the inclusion of an instruction on recklessness in the court's charge on the specific intent requirement of 18 U.S.C. 1005.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2380

THOMAS J. PENNAVARIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1982 (Pet. App. A-2). A petition for rehearing was denied on April 23, 1982. The petition for a writ of certiorari was filed on June 28, 1982, and is untimely under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on 15 counts of misapplication of bank funds, in violation of 18 U.S.C. 656, and 68 counts of making false entries in bank records, in violation of 18 U.S.C. 1005. He

was sentenced to concurrent terms of five years' imprisonment on all counts.[1] The court of appeals affirmed in an unpublished judgment order (Pet. App. A-1 to A-2).

The evidence at trial established that petitioner, assistant manager and loan officer at the Citizen's National Bank in Monroeville, Pennsylvania, was responsible for processing personal and consumer loans. Processing included taking the applications, handling the credit checks, and closing the loans, up to his credit limit of $10,000 (Gov't Br. 4).[2] Over the course of approximately 10 months petitioner approved 24 loans to four individuals. In each instance petitioner received a share of the face amount of the loans. For example, one borrower obtained six bank loans totalling $75,000, and petitioner received $10,000 of the loan proceeds (Gov't Br. 6); another obtained six banks loans totalling $35,000, and kicked back $5,000 to petitioner (Gov't Br. 5). The purposes of the loans were falsely stated on several of the loan applications (Gov't Br. 4, 5). For example, one borrower received two loans to pay off gambling debts, but the applications stated legitimate business purposes. In other instances, the loans were made payable to knowing or unwitting "nominees" (Gov't Br. 5, 6) and, in the case of the latter, their signatures on the applications were forged (*ibid.*). Petitioner knew of the forgeries and misstatements about the real recipients of the loans, and he additionally participated in some of the falsifications by putting background information on the applications (Gov't Br. 5). In

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[1] After the jury was unable to reach a verdict on 15 counts charging violations of 18 U.S.C. 215, 656, and 1005, the court declared a mistrial as to those counts. Petitioner has not yet been retried on those counts.

[2] "Gov't Br." refers to the government's brief in the court of appeals. The extensive transcript in this case, consisting of over 20 volumes, was not available in the preparation of this response. The above statement was therefore derived from the appellate brief and consists of largely undisputed factual matters.

his defense, petitioner testified that he had no knowledge of and did not participate in the borrowers' false statements. He further testified that he did not intend to defraud the bank (Pet. 3).

In its final charge, with respect to the counts alleging false entries in the bank's records (18 U.S.C. 1005), the court instructed the jury (Tr. 2859-2861):

> There are three essential elements that the Government must prove beyond a reasonable doubt to establish a violation of 18 United States Code 1005 * * *. [T]he Government has to prove that the defendant knowingly made or caused to be made a false entry concerning a material fact in a book or record of the bank as charged; and * * * the Government must prove that the defendant made or caused to be made such entry willfully and with knowledge of its falsity with the intent to deceive. * * * Such intent may be inferred from the facts and circumstances shown at trial and is basically a question of fact for you the jury. Moreover, reckless disregard of the interests of the bank is equivalent to intent to injure or defraud. * * * A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that considering the nature and intent of the actor's conduct, that is the defendant's conduct, and the circumstances known to him its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation.

ARGUMENT

Petitioner contends (Pet. 3-6) that the trial court's instruction on recklessness permitted him to be convicted of

the Section 1005 counts even if the jury did not find that he had a specific intent to injure or defraud the bank. This argument was properly rejected by the court below.

Initially, we note that petitioner's concurrent five-year sentences on the Section 1005 counts are also concurrent to the sentences he received on the Section 656 counts, which he does not challenge. This is a singularly appropriate case in which to decline to review petitioner's claim under the concurrent sentence doctrine. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 787-791 (1969). Each false statement count corresponds to one of the fraud counts charged under Section 656, and petitioner's concurrent conviction under the former will not subject him to additional collateral consequences.[3]

In any event, petitioner's argument proceeds on a misapprehension of law. It is in fact generally agreed that " '[r]eckless disregard of the interests of the bank is equivalent to intent to injure or defraud' " in prosecutions under both 18 U.S.C. 656 and 1005. *United States* v. *Krepps*, 605 F. 2d 101, 104, 108 (3d Cir. 1979); *United States* v. *Schoenhut*, 576 F. 2d 1010, 1024 (3d Cir. 1978); *United States* v. *Wilson*, 500 F. 2d 715, 720 (5th Cir. 1974), cert. denied, 420 U.S. 977 (1975); *United States* v. *Stevison*, 471 F. 2d 143, 145 (7th Cir. 1972). Thus, the court's intent

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[3]Under the Adult Guidelines for Parole Decisionmaking, 28 C.F.R. 2.20, petitioner's fraud would be classified as a High Severity Offense. There is no possibility that petitioner's Section 1005 convictions would place petitioner in a higher category or subject him to delay in his parole eligibility. Nor would the unreviewed counts measurably add to the impeachment effect of the unchallenged fraud counts, or result in his being subject to possible enhanced penalties in the event that he commits further crimes in the future.

instruction did not permit the jury to convict petitioner under an erroneous standard of culpability.[4]

Finally, the instructions, when viewed as a whole (*United States* v. *Frady*, No. 80-1595 (Apr. 5, 1982), slip op. 17; *United States* v. *Park*, 421 U.S. 658, 674 (1975)), plainly and sufficiently charged the jury on the need to find that petitioner acted with specific intent to injure or defraud the

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[4]Petitioner's reliance on *United States* v. *Welliver*, 601 F. 2d 203 (5th Cir. 1979), is inapt. The court of appeals in that case reversed the appellant's conviction because the district court had limited its instructions to "a vague generalization equating recklessness with intent to defraud" (*id.* at 210). The court of appeals noted that "[w]hen a trial judge in his instructions refers to 'recklessness,' no more is necessarily implied than such mere negligence, carelessness, thoughtlessness, or inadvertence as could not be regarded as the equivalent of an intentional wrong" (*id.* at 210). Reversal was mandated because the instruction did not contain "a definition of 'recklessness' requiring * * * more than mere negligence, carelessness, thoughtlessness, or inadvertence" and because the court did not instruct the jury that it need not find intent to defraud from the defendant's reckless conduct (*ibid.*).

In distinct contrast to the instruction in *Welliver*, the court here charged that recklessness meant a "conscious[] disregard [of] a substantial and unjustifiable risk" (Tr. 2861)—a standard clearly requiring conduct more egregious than mere negligence, carelessness, thoughtlessness, or inadvertence. The court further charged the jury that it could not "find [petitioner] guilty of any count where the evidence establishes no more than negligence. Negligence is the basis for civil liability only. * * * Negligence is the absence of due care under all the circumstances but negligence is also the absence of criminal intent or the absence of an evil state of mind. A person cannot be convicted of a crime if his conduct amounted only to negligence or the failure to exercise due care or proper judgment under all the circumstances" (Tr. 2866-2867). This thorough instruction eliminated the possibility that petitioner could have been convicted on the basis of his "bad banking practice" (Pet. 6) unless there was an intent to defraud or injure the bank. See *United States* v. *Brien*, 617 F. 2d 299, 312 (1st Cir.), cert. denied, 446 U.S. 919 (1980) (a " 'conscious avoidance' standard implies a specific intent to avoid the proscription of the law"); *United States* v. *Natelli*, 527 F. 2d 311, 322-324 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976).

bank. The court's instructions on Section 1005 included the following admonition (Tr. 2862):

> [It] does not matter whether the bank sustained a loss. What is important is what [petitioner] intended. [Petitioner] could be guilty even if the bank has suffered no loss if he had the intent to injure or defraud. By the same token, even if the bank sustained a loss in a given transaction, [petitioner] could be innocent if he had no intent to injure or defraud in connection with the transaction.

Later, when explaining accomplice liability under 18 U.S.C. 2, the court charged that "[p]articipation is willful if done voluntarily and intentionally and with the specific intent to fail to do something which the law forbids or with a specific intent to do something the law requires to be done, that is to say with bad purpose to either disobey or disregard the law" (Tr. 2866). The court restated this instruction when, in the context of all of the charged offenses, it defined the terms "knowingly" and "willfully" (Tr. 2867). There, the court stressed that petitioner must have acted "voluntarily and purposely with the specific intent to do something that the law forbids, that is to say, with bad purpose either to disobey or disregard the law" (Tr. 2868). Thus, the charge as a whole sufficiently instructed the jury on specific intent as an element of the Section 1005 offense.[5]

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[5]Because the instruction as a whole required the jury to find the specific intent alleged in the indictment before it could convict petitioner, petitioner's suggestion (Pet. 5-6) that his conviction was based upon a theory at material variance with the indictment is without support.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1982

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